



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

The Copyright Amendment Bill

**Presentation to the Select Committee on
Trade and International Relations
13 February 2019
CAPE TOWN**

Purpose

The purpose of this presentation is to brief the Select Committee on Trade and International Relations on the Copyright Amendment Bill.

Contents

- **BACKGROUND**
- **CHALLENGES CURRENTLY FACED BY INDUSTRY**
- **OBJECTIVES OF THE BILL**
- **TREATIES INFORMING THE BILL**
- **PROPOSED AMENDMENTS**
- **RECOMMENDATIONS**

Background

- In 2010 **the dti** commissioned a study through the World Intellectual Property Organisation (WIPO) to research the benefits coming from the copyright-based industries in South Africa.
- In 2015 the Copyright Amendment Bill (CAB) was published for public consultation purposes and 122 written submissions were received.
- Cabinet approved the CAB for introduction into Parliament on 08 June 2016.
- In 2016 a Socio Economic Impact Assessment (SEIAS) was completed on the CAB.
- The Bill was introduced to Parliament and referred to the Committee on 16 May 2017.
- The Committee held two workshops on 7 February 2017 and on 27 to 28 June 2017, respectively. The Committee received a briefing on the Bill on 30 May 2017.
- The Committee called for written submissions on 26 May 2017. Advertisements were in all official languages in national, provincial and regional newspapers, as well as on social media platforms. The closing date for submissions was 19 June 2017 and the Committee received 73 submissions.

Background

- The Committee held public hearings on the Bill on 1, 3 and 4 August 2017.
- Based on the submissions, it became apparent that the Bill had a number of technical errors, which made it incompatible with the existing copyright legislation. Therefore, the Committee made a decision to redraft the Bill to address the technical inconsistencies before deliberating on any policy areas.
- Given the specialised, technical nature of copyright, the Committee appointed two technical consultants, namely Prof Tobias Schonwetter and Prof Caroline Ncube, in 2017 to assist it during its consideration of the Bill. The consultants played a pivotal role with the redraft. However, due to deliberations on the Bill, they were unable to effectively assist the Committee in 2018.
- The technically corrected redraft of the Bill was tabled by the drafting team in October 2017 and the Committee proceeded to consider the policy matters based on this version of the Bill.
- Further public consultations on the CAB were held by the Trade and Industry PC between June and November 2018 wherein additional comments on specific provisions of the CAB were requested from the public.
- The Trade and Industry PC adopted the CAB on 15 November 2018. The National Assembly passed the CAB on 5 December 2018.

Challenges Currently faced by Industry

- Lack of formalisation of the creative industry which exposes it to abuse.
- Piracy / Counterfeiting is rife and enforcement agencies not coordinated.
- Unfair contracts resulting in the perpetual signing away of their economic rights and the lack of updated industry contracts for freelance performers.
- Non-payment of royalties in the form of repeat fees and commercial exploitation for actors.
- Non–recognition of the moral and economic rights of performers.
- Non–ratification of Treaties that make provision for the recognition of the moral and economic rights.
- Non – payment of needletime royalty.
- Reciprocity regarding payment of royalties from other jurisdictions.
- Disputes not resolved speedily.
- The digital environment is not catered for in the Acts.(Non-ratification of digital Treaties).

Objectives of the CAB

- To develop a legal framework on Copyright and related rights that will promote accessibility to producers and users in a balanced manner; this includes flexibilities and advancements in the digital space that should empower all strata of the citizens of South Africa;
- To address the rights of authors in commissioned works that includes to facilitate commercial exploitation by any person so licensed;
- To introduce provisions, which deal with matters pertaining to collective management. Collecting societies will only be allowed to collect for their registered members, and all collecting societies have to be accredited with the Companies and Intellectual Property Commission (“CIPC”);
- To deal with the protection of works and rights of authors in the digital environment;
- To provide for the availability of accessible format copies of a work to accommodate persons with disabilities. This provision extends beyond matters pertaining to the blind and includes other disabilities such as learning disabilities, dyslexia etc;

Objectives of the CAB

- To introduce a Resale Royalty Right. The Resale Royalty Right means that an artist could be entitled to a royalty when their original work is resold commercially;
- To introduce a hybrid system for the reproduction of copyright material for limited uses or purposes without obtaining permission and without paying a fee or a royalty. Furthermore, this provision stipulates the factors that need to be considered in determining whether the copyright work is used fairly;
- To provide for the sharing of royalties in respect of literary, musical, artistic and audiovisual works;
- It provides for the recordal and reporting of certain acts;
- To strengthen the Copyright Tribunal so that it can deal with all Copyright and related rights matters;
- To introduce Technological Protection Measures (TPMs) to reduce incidents of copyright infringement.

Treaties Informing the Bills

- **WIPO Performances and Phonograms Treaty (WPPT)** administered by the World Intellectual Property Organisation (WIPO), deals with the rights of two kinds of beneficiaries, particularly in the digital environment: (i) performers (actors, singers, musicians, etc.); and (ii) producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds). South Africa is not a member;
- **The Beijing Treaty for Audio Visual Performances (BTAP)** deals with the intellectual property rights of performers in audio-visual performances. It is administered by WIPO, South Africa is not a member;
- **WIPO Copyright Treaty (WCT)** deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs, South Africa is not a member;
- **Marrakesh Treaty** (South Africa not a member): to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled; and
- **Berne Convention** (South Africa is a member): deals with the protection of literary and artistic works.

**Proposed
 Amendments**

Issues to be introduced by the CAB	What the Bill provides
Definitions	<p>Clause 1 proposes amendments to certain definitions and the insertion of definitions of ‘accessible format copy’, ‘art market professional’, ‘audiovisual fixation’, ‘Collecting Society’, ‘commercial’, ‘Companies Act’, ‘copyright management information’, ‘orphan work’, ‘performer’, ‘person with a disability’, ‘technologically protected work’, ‘technological protection measure’, ‘technological protection measure circumvention device’, ‘Tribunal’. <i>Pages 2-4 of the Bill.</i></p>
Scope of Copyright Protection	<p>Clause 2 proposes the insertion of section 2A in the Act, circumscribing the extent of copyright protection.</p> <p>The clause provides that copyright protection subsists in expressions and not in ideas, procedures, methods of operation or mathematical concepts.</p> <p>In the case of computer programs, in interface specifications, a table or compilation which by reason of the selection or arrangement of its content, constitutes an original work</p> <p>The clause provides that an expression of official texts of legislation or speeches of a political nature is not subject to copyright protection. <i>Page 4 of the Bill.</i></p>

**Proposed
 Amendments**

Issues to be introduced by the CAB	What the Bill provides
State or Organisation Funded Intellectual Property	<p>Clause 3 of the Bill proposes an amendment to section 5 of the Act by providing for ownership of copyright funded by the State, local or international organizations.</p> <p><i>Page 4 of the Bill.</i></p>
Communication to the public of a literary or musical work, making available and distribution of an original or a copy of a work	<p>Clause 4 of the Bill proposes an amendment to section 6 of the Act by providing for communication to the public of a musical work, by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.</p> <p><i>Page 4 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the CAB	What the Bill provides
<p>Share in royalties regarding literary and musical works</p>	<p>Clause 5 of the Bill proposes an insertion of a new section 6A specifically providing for royalty sharing after assignment of copyright in a literary or musical work or where the author of a literary or musical work authorised another to do any of the acts contemplated in section 6. The share of royalties to be determined by a written agreement in a prescribed manner. <i>Pages 5-6 of the Bill.</i></p>
<p>Distribution of an artistic work, Communication to the public and making available to the public <i>Amendment of section 7 of Act 98 of 1978</i> <i>Pages 13-14 of the Act</i></p>	<p>Clause 6 of the Bill proposes an amendment to section 7 by providing for the distribution of an artistic work to the public, communication to the public of an artistic work by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such a work from a place and at a time individually chosen by them, whether interactively or non-interactively. <i>Page 6 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the CAB	What the Bill provides
Sharing of royalties regarding a visual artistic work	<p>Clause 7 of the Bill inserts a new section 7A specifically providing for royalty sharing after assignment of copyright in an artistic work or where the author of an artistic work authorized another to do any of the acts contemplated in section 7. The share of royalties to be determined by a written agreement in a prescribed manner.</p> <p><i>Pages 6-7 of the Bill.</i></p>
Resale Royalty Right: section 7B	<p>Clause 7 also inserts section 7B that provides that the author of visual artistic work in which copyright subsists or his or her heir must be paid royalties on the commercial resale within the art market of that work.</p> <p>Royalties in respect of visual artistic works shall be payable at the rate prescribed by the Minister after consultation with the Minister responsible for arts and culture.</p> <p>The seller and the art market professional are jointly and severally liable to pay the royalties to the author. It also provides in section 7C to 7E for authors of visual artistic works to enjoy the inalienable resale royalty right on the commercial resale of his or her original work of art, subsequent to the first assignment by the author of such work of art. This includes the resale, duration, assignment or waiver of the resale royalty right.</p> <p>The resale royalty rights will only apply after the commencement date of the Copyright Amendment Act.</p> <p><i>Pages 6-8 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the CAB

Distribution, commercial renting, communication to the public and making available of an audiovisual work

What the Bill provides

Clause 8 of the Bill proposes an amendment to section 8 of the Act by providing for the distribution of an audiovisual work to the public, authorising commercial rental of the work to the public, communication to the public of an audiovisual work by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.

Pages 8-9 of the Bill.

Proposed Amendments

Issues to be introduced by the CAB

Sharing of royalties between
performers and copyright owners of
audiovisual works

What the Bill provides

Clause 9 of the Bill inserts a new section 8A specifically providing for royalty sharing between performers and the copyright owner of audiovisual works for any of the acts contemplated in section 8. The clause further provides for the share of royalties to be determined by a written agreement in a prescribed manner. It requires the recording and reporting of any act contemplated in section 8 and makes the failure to do so, an offence.

Pages 9-10 of the Bill.

Proposed Amendments

Issues to be introduced by the CAB

Royalties regarding sound
recordings

What the Bill provides

Clause 11 substitutes section 9A that provides for the royalty that is equally shared between the owner of the copyright, collecting society or indigenous community subject to the agreement to the contrary between the owner and the performer.

Page 11 of the Bill.

Proposed Amendments

Issues to be introduced by the CAB

Distribution, commercial rental, communication to the public and making available of a Sound Recording

What the Bill provides

Clause 10 of the Bill proposes an amendment to section 9 of the Act providing for the distribution of a sound recording to the public, authorising commercial rental of the work to the public, communication to the public of such sound recording by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.

Page 10 of the Bill.

Proposed Amendments

Issues to be introduced by the CAB

The Agreement: Section 6A,
7A, 8A (Share of royalties)

What the Bill provides

The royalty will be provided in the written agreement in the prescribed manner and form. The agreement must include:

- The rights and obligations of the contracting parties.
- The share of royalties.
- The method and period of payment.
- Dispute resolution mechanism.

In the instance where there is no agreement, parties may approach the Copyright Tribunal.

Pages 5, 6 and 9 of the Bill.

Proposed Amendments

Issues to be introduced by the CAB	What the Bill provides
Retrospective application of royalties	<p>Clause 5 on share of royalties in literary and musical works, clause 7 on share of royalties in artistic works and clause 9 of share of royalties in audiovisual works will apply retrospectively.</p> <p>The retrospective application of royalties is permissible and address deprivation of property as well as redress from past injustices. It applies to works in the copyright Act still exploited for profit. The Minister must develop draft regulations setting out the process to give effect to the share of royalties;</p> <p>Conduct an impact assessment of the process proposed in the regulations contemplated.</p> <p>Table the draft regulations and impact assessment in the National Assembly for approval.</p> <p>This will apply after the commencement date contemplated in section 38(2) of the Copyright Amendment Act of 2017.</p> <p><i>Pages 5-9 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the CAB

Recording and Reporting
for royalty determination

What the Bill provides

Clause 11 of the Bill proposes the substitution of section 9A of the Act. It requires the recording and reporting of any act contemplated in section 9(c), (d), (e) or (f) and makes the failure to do so, an offence. It also makes certain amendments related to the parties involved in determining the royalty amount, and for referral to the Tribunal.

The offence provides that a person convicted of an offense shall be liable for a fine or imprisonment for a period not exceeding five years or both such fine and imprisonment. For the convicted person, the fine varies for a natural or juristic person. The person convicted of a fine if is a juristic person is liable to a fine of a turnover, at the time assessed, which is the total income of that person during the financial year during which the offence or the majority of offenses were committed, to which this Act applies.

Pages 10-11 of the Bill.

Proposed Amendments

Issues to be introduced by the CAB	What the Bill provides
<p>General Exceptions and specific exceptions regarding protection of copyright work; permission to make copies; Exceptions related to educational and academic activities</p>	<p>Clause 13 of the Bill proposes the insertion of section 12A in the Act, providing for the general exceptions from copyright protection for all works, which is a hybrid model of use of work or the performance and includes factors to consider to ensure the usage of the works is fair; section 12B provides for specific exceptions from copyright protection for all works and section 12C is providing for the permission to make transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process. It also proposes the insertion of section 12D providing for exceptions related to educational and academic activities. All these sections have safeguards on the use of copyright works.</p> <p><i>Pages 12-15 of the Bill.</i></p>
<p>Freedom of Panorama</p>	<p>Clause 14 of the Bill proposes an amendment to section 15 of the Act to provide for panorama and incidental use exceptions. <i>Page 15 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the CAB

Exceptions regarding Computer
Programmes

What the Bill provides

Clause 19 of the Bill proposes an amendment to section 19B of the Act by providing that the person having a right to use a copy of a computer program shall be entitled, without the authorization of the copyright owner, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program, if he or she does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he or she is entitled to do.

Pages 15-16 of the Bill.

Proposed Amendments

Issues to be introduced by the CAB	What the Bill provides
<p>General exceptions regarding protection of copyright works for libraries, archives, museums and galleries as well as for persons with disability</p>	<p>Clause 20 of the Bill proposes the insertion of sections 19C and 19D into the Act by providing general exceptions regarding protection of copyright work for libraries, archives, museums and galleries, as well as exceptions regarding protection of copyright work for persons with disability. <i>Pages 16-18 of the Bill.</i></p>
<p>Moral Right</p>	<p>Clause 21 of the Bill proposes an amendment to section 20 of the Act, thereby providing for an author to have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author. The clause further provides that the author shall be deemed to have the right to take legal action related to the infringement of the provisions of this section on moral rights. <i>Page 18 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the CAB	What the Bill provides
Ownership of copyright in Commissioned Works	<p>Clause 22 of the Bill proposes an amendment to section 21 of the Act to provide for the ownership of any copyright subsisting in the work between the person commissioning the work and the author who executes the commission to be governed by written agreement. It further provides for the protection of the author by allowing an application to the Tribunal where the work is not used by the person who commissioned it for the purpose it was commissioned; where the work is used for the use other than that for which it was commissioned; when the commissioned work is of a personal nature, the Tribunal may not license the author to use that work. When considering the license when the work is not used by the person who commissioned, the Tribunal must take all relevant factors into account.</p> <p><i>Pages 18-19 of the Bill.</i></p>
Assignment of literary or musical work	<p>Clause 23 of the Bill proposes an amendment to section 22 of the Act by providing that copyright owned by, vesting in or under the custody of the State may not be assigned. It also provides a reversion right for where copyright in a literary or musical work was assigned by an author shall only be valid for a period of up to 25 years from the date of such assignment. Such a license can be verbal or in writing.</p> <p><i>Pages 19-20 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the CAB	What the Bill provides
Licenses in respect of Orphan Works	<p>Clause 24 of the Bill proposes the insertion into the Act of a new section 22A, making provision for licences in respect of orphan works. The clause provides for orphan works for resale royalty rights.</p> <p><i>Pages 20-21 of the Bill.</i></p>
Accreditation, Administration and Regulation of Collecting Societies	<p>Clause 25 of the Bill proposes the insertion of a new Chapter 1A into the Act and provides for the accreditation that include the transformation requirements in the collecting society, administration and regulation of collecting societies. It also provides that where a person intentionally gives him or herself out as a collecting society, that person commits an offence. The Bill provides the transitional arrangement period of 18 months for the accreditation of existing collecting societies. The collecting society can make royalty payments where there are reciprocal agreements with other collecting societies outside the Republic.</p> <p>The clause provides for the control of collecting society by authors, performers or copyright owners and the functions it will perform such as to collect and distribute royalties. It further provides for the suspension, cancellation of accreditation of collecting societies and the role of the Commission in that regard as well as the skills requirement of the person appointed by the Tribunal for the administration and discharging of the functions of the collecting society.</p> <p><i>Pages 21-24 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the CAB	What the Bill provides
Copyright Management Information (CMI)	<p>Clause 26 of the Bill proposes an amendment to section 23 of the Act by providing for an offence if a person tampers with information managing copyright or abuses copyright and technological protection measures.</p> <p><i>Page 24 of the Bill.</i></p>
Technological Protection Measure (TPM)	<p>Clause 27 of the Bill proposes an amendment to section 27 of the Act by inserting a new subsection, which provides for an offence if a person unlawfully circumvents technological protection measures applied by the author or copyright owner. It also provides for penalties where the convicted person is not a natural person.</p> <p><i>Pages 24-25 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the CAB	What the Bill provides
Circumvention of TPM	<p>Clause 28 of the Bill proposes amendments to section 28 of the Act, which provides for the copying of a work to constitute an infringement of copyright, if such copying would have constituted infringement in the country in which the work was made.</p> <p><i>Pages 25-26 of the Bill.</i></p>
Prohibited conducted in terms of CMI and TPM	<p>Clause 29 of the Bill proposes the insertion of sections 28O, 28P, 28Q, 28R, and 28S in the Act providing for prohibited conduct in respect of technological protection measures and of copyright management information; exceptions in respect of technological protection measures and copyright management information; and enforcement by the Commission.</p> <p><i>Pages 26-27 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the CAB	What the Bill provides
Copyright Tribunal	<p>Clauses 30 and 31 of the Bill amends section 29 and propose the insertion of sections 29A to 29H into the Act, which provide for, amongst others, the strengthening of the Copyright Tribunal; its functions; appointment of its members; term of office; removal and suspensions; and procedural matters on the conduct of hearings of the Tribunal. <i>Pages 27-28 of the Bill.</i></p>
Regulations	<p>Clause 33 of the Bill proposes an amendment to section 39 of the Act by providing for ministerial powers to prescribe regulations relating amongst others to the procedure for the conduct of Tribunal hearings and relating to Collecting Societies, as well as prescribing minimum standards for contracts. <i>Page 30 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the CAB	What the Bill provides
Unenforceable Contracts	<p>Clause 34 of the Bill proposes a new section 39B, and provides that a term in a contract that purports to prevent or restrict any act which by virtue of the Act would not infringe copyright or which purports to renounce a right or protection afforded by the Act will be unenforceable.</p> <p><i>Page 31 of the Bill.</i></p>
Schedule 2	<p>Clause 35 of the Bill proposes the insertion into the Act of a new Schedule 2, providing for “Translation Licences” and “Reproduction Licences”.</p> <p><i>Pages 31-35 of the Bill.</i></p>
‘Cinematograph Films’ and ‘Film’	<p>Clause 36 provides for the substitution of the expressions “cinematograph film” and “film” with “audiovisual work” and “work”.</p> <p><i>Page 35 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the CAB	What the Bill provides
Transitional Provisions	<p>Clause 37 provides for transitional provisions related to terms inserted in the Act by the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013).</p> <p><i>Page 35 of the Bill.</i></p>
Short Title and Commencement	<p>Clause 38 of the Bill provides for the short title and commencement.</p> <p><i>Page 36 of the Bill.</i></p>



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Thank You